Sunny G. WARD, Widow of John D. Ward, Deceased,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and Zapata-Haynie Corporation et al.,
Respondents.

No. 81-4233

United States Court of Appeals,
Fifth Circuit.
Aug. 23, 1982

Appeal was taken from decision entered by the Benefits Review Board denying claim for benefits under Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that airplane pilot who died when his aircraft crashed while spotting fish in Gulf Coast waters was engaged in maritime employment, died in maritime situs, and was not member of crew of vessel, and thus his dependents were entitled to benefits under the Act.

Reversed and remanded.

1. Workers' Compensation key 2(2

Coverage of the Longshoremen's and Harbor Workers' Compensation Act is not limited to occupations specifically

listed in section defining term "employee." Longshoremen's and Harbor Workers' Compensation Act, §2(3) as amended 33 U.S.C.A. §902(3).

2. Workers' Compensation key 262

Pilot who is not entitled to Jones Act coverage is not excluded from Longshoremen's and Harbor Workers' Compensation Act benefits. Longshoremen's and Harbor Workers' Compensation Act, §2(3) as amended 33 U.S.C.A. §902 (3); Jones Act, 46 U.S. C. A. §688.

3. Workers' Compensation key 262

Airplane pilot who died when his aircraft crashed while spotting fish in Gulf Coast waters was engaged in maritime employment, died in maritime situs and was not member of crew of vessel, and thus his dependents were entitled to benefits under Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §3(a) as amended 33 U.S.C.A. §903(a).

Petition for Review of An Order of the Benefits Review Board.

Before RUBIN, REAVLEY and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Benefits are claimed under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950 (1976) (LHWCA *or* Act) by the dependents of an airplane

pilot engaged in spotting fish who died when his aircraft crashed into the waters of the Mississippi Sound, two miles off Mississippi's Gulf Coast. A panel of the Benefits Review Board denied the claim, with one judge dissenting. *Ward v. Zapata-Haynie Corp.*, No. 80-287 (Ben.Rev.Bd. June 11, 1981). [1] Concluding that the pilot was engaged in maritime employment, died in a maritime situs, and was not excluded from LHWCA coverage as a member of the crew of a vessel, we reverse and remand.

As part of his regular employment, John D. Ward flew a Cessna 172 airplane from an airport in Mississippi over the Gulf in order to locate schools of menhaden so that he could direct fishing boats to them. Once he located a school, Ward communicated with the fishing vessels by radio, instructing their crews how to locate the school and how to pull, spread, and close their nets in order to catch the fish. Ward was paid a weekly wage and a bonus based on the number of fish caught.

The LHWCA provides for compensation to workers killed or injured during the course of maritime employment. For 45 years after its enactment in 1927, the Act's

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1/ Administrative Appeals Judge Kalaris concluded that Ward was not covered because fishermen, as members of the crew of a vessel, are not covered by the LHWCA. 33 U.S.C. §902(3) (1976). Judge Kalaris reasoned that removing the spotter from the crow's nest of the vessel to an airplane should not change the status of the employee for LHWCA purposes.

Chief Administrative Appeals Judge Smith agreed that Ward was not covered, reasoning that Ward did not fall within the occupational classifications of Section 902(3). Administrative Appeals Judge Miller dissented, stating that, because Ward was injured over navigable waters and would, therefore, have been covered prior to the 1972 amendments, he should still be covered. Judge Miller also concluded that Ward was engaged in maritime employment even under his colleagues' test.

test for coverage was simply whether the employee suffered injury on navigable waters. *See Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1972); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, at 1037 (5th Cir. 1982) (en banc). In 1972, Congress amended the LHWCA to add a status test to this traditional situs test in determining coverage. The status test requires that workers be engaged in "maritime employment," LHWCA §3(a), and the situs test now requires that injury occur "upon the navigable waters of the United States." *Id.* § 3(a), 33 U.S.C. §903(a). *See generally Boudreaux*, at 1037-38. [2] The Act excludes from coverage "a master or member of a crew of any vessel. . . ." 33 U.S.C. §902(3).

I.

We recently held in *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982) (en banc), that a person required to work on navigable waters and who would consequently have been covered by the pre-1972 LHWCA is still covered. At 1038. The employee in *Boudreaux* , who was engaged in moving wireline equipment on a movable drilling barge, would have been considered to be engaged in maritime employment for LHWCA purposes before the Act's revision because the accident causing his death occurred *over* navigable waters. We concluded that Congress did not intend to remove such persons from LHWCA coverage. *Id.* Thus, because of that congressional intent, we held that employees injured on water during the course of their employment met both the situs and status tests. *Id.* at 1039, 1045.[3]

2/ The Act also covers accidents occurring in areas adjoining navigable waters. 33 U.S.C. §903(a).

3/ We reserved only the question, not here raised, whether coverage extended to a person whose employment brought him "transiently or fortuitously" on the waters. *See Boudreaux*, at 1039.

The statute requires that "*the injury*" occur "upon the navigable waters of the United States." 33 U.S.C. §903(a). The employer argues that Ward was not covered because he was never "upon" water. He was certainly and literally on, then in, water at the moment of the crash. But we are not content to rest on this scrupulous reading of the statute; the Act has consistently been given a liberal construction in view of its remedial purpose. *Boudreaux*, at 1038. Employees who, like Boudreaux, were "on" vessels when injured or killed have always been held to be on the navigable waters. *See, e. g., Calbeck*, 370 U.S. at 115 n.2, 82 S. Ct. at 1197 n.2; *Pippen v. Shell Oil Co.*, 661 F.2d 378, 380 (5th Cir. 1981); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 55 (5th Cir. 1981); *See also Nalco Chemical Corp. v. Shea*, 419 F.2d 572, 574 (5th Cir. 1969) (per curiam) (pilot salesman who did much of his work over water, and who was killed when his plane crashed into navigable waters, held covered by the Act). An employee who dies when an aircraft strikes the water and who has been regularly required to fly over the water in the course of his employment, using an airplane merely to do what vessels once did, and could still do, should likewise be covered.

[1] The employer also contends that Ward did not meet the "status" requirement because his employment was not of the maritime character contemplated by section 2(3). [4] *Boudreaux* decides that issue: an employee injured in the regular course of his employment on the navigable waters of the United States automatically meets both the status and situs tests. At 1045. *In P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S. Ct. 328, 62 L.Ed.2d 225, (1979), the

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4/ "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U.S.C. §902(3).

Court declared that we should look to the nature of the activity to which the worker is assigned in determining whether employment is maritime. *Id.* at 82-83, 100 S.Ct. at 337, 62 L.Ed.2d at 236. *See Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 n.16 (5th Cir. 1980) ("Clearly we must look to the purpose of the work, not solely to the particular skills used."). The *Pfeiffer* Court explicitly stated: "we understand the word 'including' to indicate that 'longshoring operations' comprise a part of the *larger group of activities that make up maritime employment.*" *Id.* at 72 n.7, 100 S.Ct. at 334 N.7, 62 L.Ed.2d at 233 n.7 (emphasis added). Adhering to that suggestion and attempting to fulfill the broad remedial purposes of the Act, we hold that its coverage is not limited to the occupations specifically listed. [5]

Before the advent of the aircraft, the fish-spotting function was performed by a member of the vessel's crew. Indeed, during inclement weather, spotting is still done from the ship. Thus, even if we were to apply the stricter definition of maritime employment, requiring a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters, Ward would be covered. *See Weyerhauser Corp. v. Gilmore*, 528 F.2d 957 (9th Cir.), *cert. denied*, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976); *See also Boudreaux*, at 1056 (Gee, J., dissenting); *cf. Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824(5th

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5/ Indeed, the statute states that the list of covered employees "includes" the enumerated occupations. It does not *limit* coverage to those occupations. *See supra* note 4. As the Senate Report states: "The definition specifically includes any longshoreman or other person engaged in longshoring operations, any harborworker, including a ship repairman, shipbuilder or ship breaker. *It does not exclude other employees traditionally covered* . . . ." S.Rep.No. 1125, 92d Cong., 2d Sess. 16 (1972) (emphasis added).

Cir. 1980) (per curiam) (crash of helicopter while transporting personnel and supplies to offshore drilling structure bears significant relationship to traditional maritime activity, conferring admiralty jurisdiction). [6]

The employer argues that our decision in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979), requires us to deny coverage. In *Thibodaux*, we stated that an employee could satisfy the status test in two ways: he might, at the time of injury, be engaged in an *activity* properly classified as maritime employment, or he might be engaged in an *occupation* considered maritime employment. 580 F.2d at 844. We concluded in *Thibodaux* that the employee failed to meet the "occupation" test because he was an oilfield worker and maintenance man and failed to meet the "activity" test because, at the time of his injury, he was merely being transported to his landbased job.

The employer would have us hold that the list of occupations in section 902(3) is exclusive, and that, because Ward was not engaged in longshoring or shipbuilding or repair at the time of his death, he cannot be covered by the LHWCA. We have rejected that construction of the statute earlier in this opinion. *See supra* note 5 and accompanying text. *Accord Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 781 (5th Cir. 1982) (courier/driver for maritime service agency is covered under *Thibodaux* test). Because Ward was engaged

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6/ In cases brought under the Jones Act, a liberal interpretation of coverage is consonant with the intent of Congress. *Warner v. Goltra*, 293 U. S. 155, 156, 55 S.Ct. 46, 79 L.Ed. 254 (1934). We need not now decide whether in the event of a direct conflict between a liberal interpretation of the Jones Act and a liberal interpretation of the LHWCA, which would prevail.

in a maritime occupation and was performing that occupation at the "moment of injury," *see Miller*, 673 F.2d at 781, he met both prongs of the *Thibodaux* test. [7]

II.

The employer next argues that, because Ward was a crew member, he was excluded from LHWCA coverage. When Congress passed the original LHWCA in 1927, it did not cover the "master or member of a crew" of any vessel because seamen were already accorded a general maritime law remedy for unseaworthiness of a vessel and a statutory remedy for negligence under the Jones Act. The seamen's unions preferred to retain these remedies. *See South Chicago Coal & Dock Company v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940). In the debate on the floor of the House of Representatives preceding passage of the 1927 act, the term "member of a crew" was explained as embracing fishermen as well as seaman. [8] The "crew member" exclusion was left when it passed the 1972 amendments to the LHWCA.

[2] In *Smith v. Pan Air Corp.*, slip op. p. 4539, ____ F.2d ____ , No. 81-3522, decided today, we hold that a plane is not a vessel under the Jones Act. Because the statutes

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7/ Furthermore, as we pointed out in *Boudreaux*, *Thibodaux* presented a materially different factual situation. The plaintiff's claim under the LHWCA in *Thibodaux* had been consolidated with actions under the Jones Act and the general maritime law. In fact, the claimant had already negotiated a settlement of the action against one of the parties under the Jones Act for $40,000. Because of those factors, the LHWCA neither required nor was given in *Thibodaux* the liberal construction usually accorded it. *See Boudreaux*, at 1038, 1048 & n.29.

8/ 68 Cong.Rec. 5403 (1927).

employ the self-same language, and dovetail by design, we conclude that the pilot who is not entitled to Jones Act coverage is not excluded from LHWCA benefits. The reference to fishermen" in the House debate does not strain this conclusion. The term was, in 1927, evidently taken to mean those who fished from conventional vessels, not all who might one day perform the functions then performed by look-outs stationed on a ship's mast.

It is suggested that Congress, in amending the Act in 1972, decided to accommodate it to "the advent of modern cargo-handling techniques." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 269-70, 97 S.Ct. 2348, 2360, 53 L.Ed.2d 320, 336 (1977) (quoting S. Rep.No. 92-1125, at 13; H.R.Rep.No. 92-1441, at 10, *reprinted in* 1972 U.S. Code Cong. Ad. News 4698, 4707). Congress did adapt the Act to meet industrial change. It may do so again. However, statutory alteration is its province, not ours. While the language of a statute is not frozen in the mold of the year of its adoption, and courts should construe statutory words flexibly with an eye to legislative purpose, we are given no commission to determine what is socially useful. Those who serve on vessels were given a set of remedies because Congress considered it to be desirable. It does not follow that we should determine that either pilots, their employers, or society would be better served by classifying even pilots who spot fish as Jones Act seamen.

III.

[3] We hold that, at the time of his death, Ward was engaged in maritime employment over navigable waters, meeting both the status and situs tests for LHWCA coverage. Accordingly, the judgment of the Benefits Review Board is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

APPENDIX B

BENEFITS REVIEW BOARD
U. S. DEPARTMENT OF LABOR

No. 80-287

SUNNY G. WARD
(Widow of JOHN D. WARD)
Claimant-Respondent

v.

ZAPATA-HAYNIE CORPORATION
and
HARTFORD INSURANCE COMPANY
Employer/Carrier-Petitioner

DECISION and ORDER
Filed June 11, 1981

Appeal from the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

John L. Hunter (Cumbest, Cumbest & Hunter, P.A.), Pascagoula, Mississippi, for the claimant.

Alben N. Hopkins (Hopkins & Logan), Gulfport, Mississippi, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER * and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

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* Dissent by MILLER, Administrative Appeals Judge, to follow.

This is an appeal by the employer from the Decision and Order (79-LHCA-1676N) of Administrative Law Judge Ben H. Walley pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act). The issue presented in this case is whether a fish spotter pilot is covered under the Act. 33 U.S.C. §§902(3), 903(a).

John D. Ward began working for employer as a fish spotter pilot in September 1977. His duties consisted of flying a Cessna 172 aircraft over the Gulf of Mexico to locate schools of menhaden fish. Upon locating a school, he would contact employer's fishing boat or boats nearby and direct them to the location. He would then direct the activity of the crew members in pulling, spreading and closing nets to catch the fish. This function had previously been performed by a crew member of a fishing vessel who observed from the crow's nest to determine where these schools of fish were located. In the early 1950's, aircraft began to be used for this purpose. Today, crew members still perform this function when the planes come into bad weather or otherwise cannot go out.

On September 11, 1978, John Ward was killed when he crashed into the Mississippi Sound shortly after departing the area of a "spotting" to return to the landing field. Subsequently, his widow (hereinafter, claimant) sought death benefits pursuant to Section 9 of the Act. 33 U.S.C. §909. The employer controverted, contending that there was no jurisdiction under the Act.

In a Decision and Order entered on March 14, 1980, the administrative law judge awarded benefits to the claimant for the death of her husband, finding that decedent met the jurisdictional requirements of status under Section 2(3) and situs under Section 3(a). 33 U.S.C. §§902(3), 903(a). The employer appeals, arguing that there is neither status nor situs, and that application * * * *

> shipbuilder, and ship-breaker, but such term does not include a master or *member of a crew of any vessel* . . . .[Emphasis added.]

33 U.S.C. §902(3). *See also* Section 3(a)(1). 2/

In order to determine whether an employee is a "crew member" for purposes of the Act, the Board has employed the following three-part analysis: (1) whether the vessel is in navigation; (2) whether the worker had a more or less permanent connection with the vessel; and (3) whether the worker was aboard primarily to aid in navigation. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975); *McIntosh v. Parkhill-Goodloe Co., Inc.*, 4 BRBS 3, BRB No. 75-263 (1976), *aff'd* 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 761 (1978). A fish spotter operating from a crow's nest would clearly meet these criteria. He works on a vessel which is in navigation and he has a permanent connection with the vessel. Moreover, his duties are closely tied to the navigation of the vessel since he directs the vessel to schools of fish.

In addition, we note the following exchange on the floor of the House shortly before the passage of the Act concerning the "member of the crew" exclusion:

> Mr. Abernethy: As I understand, this bill takes from its provisions seamen, *fishermen*,

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2/ When Congress passed the original Longshoremen's Act in 1927, it inserted the "master or member of a crew'. language because remedial legislation for seamen (in the form of General Maritime Law and the Jones Act) was already in existence and was preferred by the seamen's unions. For a discussion of the legislative history, *see South Chicago Coal & Dock Company v. Bassett*, 309 U.S. 251 (1940). The "crew member" exclusion was left untouched by Congress when it passed the 1972 amendments to the Act.

and oystermen, and does not include any shipyard or repair yard except a dry dock.

Mr. Graham: That is correct.

[Emphasis added.] 68 Cong. Rec. 5403 (1927). Mr. Graham, answering the question above, was chairman of the House Judiciary Committee which reported out the Senate Bill, and he also sponsored similar legislation in the House. As such, his views are entitled to some weight in construing the Act. *See* Sutherland, *Statutory Construction*, Section 49.14, 14.15.

Accordingly, we must conclude that a fish spotter operating from the crow's nest would be excluded. Indeed, it appears that all fisherman would be excluded. The question remains whether the recent advent of fish spotter piloting removes the fish spotter from the "crew member" exclusion and grants him status under the Act.

In the recent case of *Northeast Marine Terminal Co., Inc. v. Caputo*, 430 U.S. 249, 6 BRBS 150 (1977) (hereinafter, *Caputo/Blundo*), the United States Supreme Court held that claimant Blundo, a checker injured while marking items of cargo as they were being unloaded from a container, met the Act's status requirement. The Court ruled that Blundo was performing covered work even though the recent development of "containerization" had moved work traditionally done on a vessel to the land. The Court based its decision on the fact that Congress, in amending the Act in 1972, decided to accommodate the Act to "the advent of modern cargo-handling techniques." 432 U.S. 269, 270, quoting from S. Rep. 13; H.R. Rep. 10, U.S. Code Cong. Admin. News 1972, p. 4707.

In the present case, we are faced with the converse of the situation encountered in *Caputo/Blundo*: that is, whether

an employee whom Congress specifically intended to exclude from the Act's coverage becomes eligible because the modernization of fish spotting techniques moves him from the fishing vessel into an airplane. In this light, it is clear that, since Congress desired to exclude a fish spotter operating from a crow's nest from coverage, it could not have intended the advent of fish spotter piloting to create a new class of covered employees.

Furthermore, while a fish spotter pilot is neither physically aboard nor permanently assigned to only one particular vessel, he still bears the same functional attachment to his employer's fishing vessels as the traditional spotter did to the vessel on which he served. Therefore, a fish spotter pilot still qualifies as a "crew member" for purposes of the Act. As a "crew member," decedent is excluded from coverage.

Accordingly, the Decision and Order below is reversed.

In view of our disposition of this case, claimant's Petition for Attorney Fees is denied. *See* Section 28 of the Act, 33 U.S.C. §928.

SO ORDERED.

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, concurring:

I concur in the decision to reverse the award of benefits; however, my rationale for so ruling differs from that expressed in the lead opinion.

Section 2(3) of the Act establishes a series of occupations

within the purview of the status test of coverage. In my opinion, consideration of the exclusions from coverage set forth in Sections 2(3) and 3(a) is only required once a claimant has demonstrated coverage under one of the affirmative occupational classifications listed in Section 2(3).

The decedent in the instant case was not a longshoreman, a person engaged in longshoring operations, a harbor worker, ship repairman, shipbuilder, or shipbreaker. Thus, coverage may be accorded only if the decedent was engaged in maritime employment.

Inasmuch as Section 2(3) establishes an occupational as opposed to a geographical test of maritime employment, injury or death over navigable waters is not dispositive in ascertaining what constitutes maritime employment under Section 2(3). *See P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979); *Sedmak v. Perini North River Associates,* 9 BRBS 378, BRB No. 77-896 *et al.* (1978), *aff'd sub nom. Fusco v. Perini North River Associates,* 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied,* 101 S.Ct. 953 (1981). Rather, occupational duties must bear a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters to invoke the characterization of "maritime employment" under the status test. *Sedmak,* 9 BRBS at 386.1/

Application of the *Sedmak* test must be effected within the context of the legislation that gave rise to the Act. Thus, analysis of coverage issues is vitally influenced by legislative history. As noted in the lead opinion, the legislative history of the Longshore Act evidences an intention to exclude from coverage fishermen and other individuals whose work may

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1/ *Compare Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972).

be deemed "maritime" in common parlance, yet whose occupational injuries were not intended to be compensated under this particular legislation.

The occupations delineated in Section 2(3), as well as the title of the Act itself, signify a congressional interest in covering employees engaged in the transfer of cargo between ship and land transportation. Case law construing the Act has thus extended coverage to workers involved in this dimension of navigation and commerce, whether the employment activity is that traditionally performed by ships' workers or the modern functional equivalent of tasks which, due to the advent of modernization and specialization in maritime industries, have changed in form yet not in function. *See P. C. Pfeiffer Co., Inc. v. Ford, supra; Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); *See also Ganish v. Sea-Land Services, Inc.*, BRBS, BRB No. 80-159 (April 28, 1981).

The legislative history of the Act, the language of the Act itself, and the case law which construes its provisions thus mandate the conclusion that the decedent herein, a fish spotter pilot, was not engaged in maritime employment within the meaning of Section 2(3). Inasmuch as claimant has failed to demonstrate coverage under any of the affirmative occupational classifications set forth in the Act, I need not reach the issue of whether the decedent was barred from coverage as a member of a crew of a vessel.

/s/ Samuel J. Smith
SAMUEL J. SMITH, Chief
Administrative Appeals Judge

SERVICE SHEET

BRB No. 80-287: Sunny G. Ward (Widow of John D. Ward, Sr.) v. Zapata-Haynie Corporation and Hartford Insurance Company (Case No. 79-LHCA-1676N) (OWCP No. 6-43746)

Copies were sent to the following:

Alben N. Hopkins, Esq. Certified
Hopkins and Logan
2701 24th Avenue
Gulfport, MS 39501

John L. Hunter, Esq. Certified
Cumbest, Cumbest and
Hunter, P.A.
P.O. Drawer 1287
707 Watts Avenue
Pascagoula, MS 39567

Miss Laurie Streeter Certified
Associate Solicitor
U.S. Department of Labor
N-2620, NDOL
Washington, D. C. 20210

Mr. Aaron Moore
Assistant Deputy Commissioner
US DOL/ESA/OWCP
311 West Monroe Street
Jacksonville, Fl. 32201

Judge Ben Walley
U.S. Department of Labor Suite 901
1001 Howard Avenue
New Orleans, La. 70113

Mr. Ralph M. Hartman Director,
Office of Workers' Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, D. C. 20210

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR
No. 80-287

SUNNY G. WARD
(Widow of JOHN D. WARD)
Claimant-Respondent

v.

ZAPATA-HAYNIE CORPORATION
and
HARTFORD INSURANCE COMPANY
Employer/Carrier-Petitioners

DISSENTING OPINION
Filed August 17, 1981

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' holding that the decedent was not a covered employee under the Act. I would hold that the decedent met the jurisdictional requirements of Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a). Furthermore, I would hold that the decedent should not be excluded from coverage as a "member of a crew of any vessel" under Section 2(3) of the Act.

I.

In giving consideration to this case, the Supreme Court's directives in one of the first cases presented under the Act must be kept in mind.

> [The Act] requires employers to make payments for the relief of employees and their

> dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. *[The Act is] deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which [it was] enacted and, if possible, so as to avoid incongruous or harsh results.* [Citation omitted].

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932). *See also Voris v. Eikel*, 346 U.S. 328 (1953).

The United States Court of Appeals for the Fifth Circuit, the circuit in which this case arises, set forth guidelines in *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248 (5th Cir. 1980), *aff'g Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, BRB Nos. 78-304/A, *aff'd on reconsideration*, 9 BRBS 490 (1978), concerning the interpretation to be given coverage provisions of the Act. In considering the proper test to be used for determining questions of coverage, the Fifth Circuit looked to the Supreme Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 6 BRBS 150, 432 U.S. 249 (1977). "In resolving whether employees satisfied the 'status' test of the [Act], the Supreme Court noted that the 1972 Amendments [to the Act] are broad and suggest taking an expansive view of coverage." *Oilfield Safety*, 625 F.2d at 1253. 1/ The Fifth

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1/ The language of the [1972] Amendments is broad and suggests that we should taken an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation.

Circuit then rejected the "right to control" test in determining the coverage issue of employee-employer relationship because it "tends to exclude, and thus is inappropriate for the [Act]." *Id.* It is clear, then, that tests of coverage, such as those for the employee-employer relationship as well as for "status", should be inclusive.

My colleagues further fail to provide the decedent the benefit of the Section 20(a) presumption, 33 U.S.C. §920 (a), that "the claim comes within the provisions of this Act." While my colleagues would deny application of Section 20(a) to questions of coverage, as I pointed out in my dissenting opinions in *LeMelle v. B. F. Diamond Construction Co.*, BRBS, BRB No. 79-640 (June 11, 1981), and *Brown v. Hydro-Dredge Corp.*, BRBS, BRB Nos. 79-721/A (June 10, 1981), such an interpretation deprives a claimant of the full panoply of protection provided by the Act. As I demonstrated in *LeMelle* and *Brown*, the Section 20(a) presumption does not apply to questions of statutory interpretation, but, once the test to be used has been determined, Section 20(a) applies to presume that the decedent met that test. The question presented, then, is whether employer has shown that the decedent did not meet any of the "status" under Section 2(3) of the Act.

I would hold that, since the decedent would have been covered under the Act prior to the 1972 amendments because he was injured over pre-1972 amendment navigable waters, the decedent is covered by the Act under the 1972 amendments. *See* my dissents in *Sedmak v. Perini North*

1/ Continued
The Act 'must be liberally construed in conformance with its purpose' and in a way which avoids harsh and incongruous results. *Voris v. Eikel*, 346 U.S. 328, 333 (1953).
Northeast Marine Terminal Co. v. Caputo, 6 BRBS 150, 161-62, 432 U.S. 249 (1977).

River Associates, 9 BRBS 378, BRB Nos. 77-896 *et al.* (1978) (hereinafter, *Sedmak*), and *Churchill v. Perini North River Associates*, 12 BRBS 929, BRB Nos. 79-113 *et al.* (1980) (hereinafter, *Churchill*). As I demonstrated in my dissenting opinions in *Sedmak* and *Churchill*, since Congress, in amending the Act, clearly intended that all employees who would have been covered prior to the 1972 amendments would continue to be covered, all injuries sustained over "navigable waters" as defined prior to the 1972 amendments to the Act are covered post-amendment.2/

The Fourth Circuit in *Brown & Root, Inc. v. Joyner*, 11 BRBS 86, 607 F.2d 1087 (1979), *cert. denied*, 100 S. Ct. 2960 (1980), found it unnecessary to consider whether Congress intended the 1972 amendments to the Act to exclude employees of maritime businesses who would have been covered before 1972 because their injuries occurred on navigable waters regardless of the nature of their work. However, the court stated "we are confident that *employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments.*" 11 BRBS at 97, 607 F.2d at 1090 (emphasis added). The fact that the decedent was injured over pre-amendment "navigable waters," then, is dispositive of the question of jurisdiction post-amendment unless the employer establishes that the decedent was a "member of a crew of any vessel", an exclusion which was in the Act prior to the 1972 amendments and was the only limitation for injuries sustained by employees over pre-amendment

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2/ In *P. C. Pfeiffer Co. v. Ford*, 11 BRBS 320, 444 U.S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 6 BRBS 150, 432 U.S. 249 (1977), the Supreme Court dealt solely with the question of whether those claimants were "the kind of *landbased* employees that Congress intended to encompass within the term 'maritime employment.'" *Ford*, 11 BRBS at 327 (emphasis added).

"navigable waters."

However, even if it is assumed that a claimant who would have been covered prior to the 1972 amendments to the Act is now covered under the 1972 amendments only if he was engaged in "maritime employment", it is clear that the decedent met this test.

In defining the term "maritime employment," consideration must be given to the underlying purposes of the Act. *See Baltimore & Philadelphia Steamboat Co.; Smith v. Aerojet-General Shipyards, Inc.*, 13 BRBS 391, F.2d, Nos. 78-3794, 1-3818 (5th Cir., filed June 8, 1981). The original Act was enacted to provide a compensation remedy for those employees who were outside of the constitutional jurisdiction of the state compensation acts. *See* my dissenting opinion in *Sedmak* and cases cited therein. In other words, the Act provided a compensation remedy to supplant the employee's maritime tort remedy against his employer. In order to cover all employees who could have brought a maritime tort action against their employers, Congress based jurisdiction under the Act upon the foundation of traditional maritime tort jurisdiction: injury over actual navigable waters.

The enactment of the 1972 amendments did not change this underlying purpose of the Act: replacement of an employee's maritime tort remedies with a compensation remedy. The 1972 amendments merely served to expand this compensation remedy to insure coverage of those land-based employees whose coverage shifted between the Act and inadequate state compensation benefits. *See* my dissenting opinion in *Sedmak*. *See also* note 2 *supra*. The 1972 amendments to the Act, then, must not be construed

in violation of one of the prime purposes of the Act: "maritime employment" must be construed to include at least that work performed over pre-1972 amendment navigable waters.

This case arises in the Fifth Circuit. In *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969), the Fifth Circuit found coverage for a pilot salesman who did much of his work over water, and who was killed when his plane crashed into navigable waters. 3/ The court concluded

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3/ In *Thibodeaux v. Atlantic Richfield Co.*, 8 BRBS 787, 580 F.2d 841 (5th Cir. 1978), the Fifth Circuit denied coverage under the Act to an oilfield construction and maintenance man who was injured while being transported by vessel to a work site accessible only by water. *Thibodeaux* must be distinguished from the instant case on two grounds:

(1) When a claim is presented for consideration under the Act, a policy of liberal construction is essential. However, when a claim under the Act is consolidated with a claim under the Jones Act, the latter also having a policy of liberal construction, reference to the policy of liberal construction underlying either Act is unnecessary because the claimant is assured of an adequate recovery. In *Thibodeaux*, the claimant's claim under the Act had been consolidated with actions under both the Jones Act and general maritime law (in fact, the claimant in that case had negotiated a settlement for $40,000 of the action against one of the parties under the Jones Act). Because of these factors, the Act neither required nor was given in *Thibodeaux* the liberal construction that is required herein; therefore, the holding in *Thibodeaux* is inapplicable to the instant case. *See* my separate opinions in *Sosenik v. Lockheed Construction Co.*, BRBS, BRB No. 80-142 (dissent filed July 28, 1981), and *Jonas v. Latex Construction Co.*, BRBS, BRB No. 80-349 (concurrence filed August 6, 1981). *See also* note 10 *infra* and the discussion of the Fifth Circuit's opinion in Oilfield Safety & Machine Specialties, Inc., in Part I *supra*.

(2) Even if the holding in *Thibodeaux* is assumed to be valid for a case arising under the instant circumstances, the decedent would have been covered under the Act. In *Thibodeaux*, the Fifth Circuit denied coverage because of the fortuitous nature of that claimant's

> that Quave's activities were sufficiently maritime to fall within the scope of 33 U.S.C. §902(4). It is noted that this section of the Act covers all employers whose employees are engaged in maritime employment 'in whole or in part.' This becomes significant here for Quave's activities were often over water, and it was over water that the fatal accident took place. His regular duties consisted in large part of traveling directly to offshore drilling platforms which he could only reach by boat or seaplane.

419 F.2d at 574. While this case was decided prior to the 1972 amendments, it is clear that the court made the same determination of the maritime nature of Quave's activities as it would do under Section 2(3). 4/ Therefore, the Fifth Circuit's determination that a pilot salesman (whose work took him often over water) was engaged in maritime em-

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3/ Continued
presence over navigable waters. In the instant case, the decedent's employment over navigable waters as a fish spotter pilot was *not* fortuitous: work over navigable water is an intrinsic part of fish spotter piloting.

4/ Section 2(4), operant both before and after the 1972 amendments, provides in pertinent part as follows

> The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States. . . .

33 U.S.C. §902(4).

ployment controls the result in this case.5/

Further, the decedent met even my colleagues' test for "status" under Section 2(3) of the Act as was propounded in *Sedmak*, where they held that, if a claimant does not meet one of the specific occupational classifications enumerated in Section 2(3), he may still be covered if he is engaged in "maritime employment," which was defined as a "realistically significant relationship to maritime activities involving navigation and commerce on navigable waters." 9 BRBS at 386.

Under the original *Sedmak* test for "maritime employment" - - that an employee's duties bear "a realistically significant relationship to maritime activities involving navigation and commerce on navigable waters" - - decedent was certainly a covered employee. In his job as fish spotter pilot, decedent directed the activities of the various fishing vessels in catching the fish. That decedent's duties were "maritime" in nature is supported by the fact that his job was traditionally performed by a member of a crew of a fishing vessel.6/

5/ In my opinion, *Nalco* is controlling regardless of the examination of Quave's activities since Quave was killed over navigable waters as defined in pre-amendment law. However, the Court's determination of the nature of Quave's activities is relevant to the present case as decided by the majority.

6/ The fact that work traditionally performed by the ship's crew is now, through technological advances and modernization, performed by others does not minimize the hazards of the work and should not serve as the basis for nullifying a worker's protection. *See Seas shipping Co. v. Sieracki*, 328 U.S. 85, 96 (1946).

In this regard, the beneficent purpose of the Act requires that the Supreme Court decision in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), be held inapplicable in determining the definition of "maritime employment" for purposes of Section 2(3) of the

These duties certainly constitute maritime activities involving "navigation and commerce over navigable waters." *Sedmak*. To hold otherwise is to deny the validity of the *Sedmak* analysis, which Judge Kalaris apparently sought to avoid through use of the "member of a crew" exclusion. The administrative law judge's determination that the decedent was a covered employee follows rationally from the evidence. Since it is supported by substantial evidence, it must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The majority opinion in *Sedmak*, however, can no longer

6/ Continued
Act. In *Executive Jet*, the Supreme Court was presented with a claim for damages by the owner of an aircraft which crashed into Lake Erie. The Supreme Court held that, although a determination of whether a tort was "maritime" and thus cognizable in admiralty under 28 U.S.C. §1333(1) "traditionally depended upon the locality of the wrong," 409 U.S. at 252, in claims arising from airplane accidents it is "far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268. Application of *Executive Jet* to a determination of status is inappropriate for three reasons. First, since *Executive Jet* was not issued until after the passage of the 1972 amendments, the concept of "maritime employment" embodied in the 1972 amendments to the Act is, of necessity, based upon *traditional* admiralty concepts. *See Nalco Chemical Corp. v. Shea*. Second, *Executive Jet* is limited in its application both by its own terms and by later judicial interpretations. *See* my dissenting opinion in *Sedmak*. Third, *Executive Jet* concerned a matter of *statutory* interpretation, *i. e.*, whether Congress intended the courts to apply admiralty and maritime concepts to aviation cases under 28 U.S.C. §1333 (1), while the coverage provisions of the Act, intended to be construed broadly, *see Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248 (5th Cir. 1980), are based upon concepts underlying the broader constitutional scope of admiralty.

be said to be the position of the Board, since Judge Smith's concurring opinion in this case rejects coverage for the decedent on the basis that, in order to be covered, a claimant must demonstrate coverage under one of the affirmative occupational classifications listed in Section 2(3). 7/ This rationale not only represents a change in the former position taken by Judge Smith in *Sedmak*, but is also contrary to the veiw of Section 2(3) taken by the United States Supreme Court in *Ford/Bryant*. Judge Smith's opinion apparently requires that the employment be related to one of the specific categories: this, however, ignores the language in *Ford/Bryant*, which noted that the work "including" in Section 2(3) indicates "that 'longshoring operations' comprise a part of the larger group of activities that make up 'maritime employment.' " *Ford/Bryant*, 11 BRBS at 324-25 n.7. The concurring opinion is obviously in error since it renders the term "maritime employment" in Section 2(3) meaningless, a result obviously not intended by Congress.

Finally, the decedent herein met even the stringent test for status set out in *Weyerhaeuser Co. v. Gilmore*, 3 BRBS 140, 144, 528 F.2d 957, *cert. denied*, 429 U.S. 868 (1976): that claimant's work and employment "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 8/ *See Odom Construction Co. v. Department of Labor,*

7/ While the Fifth Circuit case of *Thibodeaux v. Atlantic Richfield Co.*, 8 BRBS 787, 580 F.2d 841 (5th Cir. 1978), could be interpreted as supporting Judge Smith's holding, it is clear that, if so interpreted, this result was overruled by *Ford/Bryant* and has not been applied in later cases arising in the Fifth Circuit. See *Odom Construction Co. v. Department of Labor*, 12 BRBS 396, 622 F.2d 110 (5th Cir. 1980), *aff'g Maze v. Odom Construction Co.*, 7BRBS 467 No. 76-388 (1978). *See also* note 3 *supra.*

8/ Use of this test is appropriate in this case since it would grant, rather than deny, coverage under the Act. *See* my dissenting opinion in *Edwards v. Willamette Western Corp.*, BRBS, BRB Nos. 79-161A

12 BRBS 396, 622 F.2d 110 (5th Cir. 1980). As discussed above, the decedent performed work traditionally performed by a member of the crew: 9/ spotting fish and directing the vessel to the catch site. This clearly met even the *Weyerhaeuser* test.

III.

Having determined that the decedent was "engaged in maritime employment," the question arises as to whether the decedent was excluded from coverage as a "member of a crew of any vessel." 33 U.S.C. §902(3). I cannot concur in Judge Kalaris' usurpation of the powers of the fact-finder and her reversal of the administrative law judge's finding that the decedent was not a "member of a crew of any vessel."

The Board is required to affirm the findings of the administrative law judge if they are supported by substantial evidence, rational, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b) (3). The Board is an appellate tribunal only and may not engage in fact-finding. *Kicklighter v. Ceres Terminal, Inc.*, 13 BRBS 109, BRB No. 79-550 (1981). Furthermore, the Act must be liberally construed in conformance with its beneficent purpose. *Voris v. Eikel*, 345 U.S. 328 (1953); *Crauthers v. Northwestern Construction Co.*, 9 BRBS 880, 883, BRB No. 78-464 (1979). The Supreme Court's words in *Baltimore*

8/ Continued
(dissent filed July 16, 1981). *Compare Oilfield Safety* (tests for coverage under the Act should be inclusive, not exclusive).

9/ The fact that the job was traditionally performed by a "member of a crew" does not mean that decedent was a crew member. *See* discussion, *infra* Part III.

& Philadelphia Steamboat Co. v. Norton, 289 U.S. 408 (1932), cited above, bear repetition.

> [The Act is] deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which [it was] enacted and, if possible, so as to avoid incongruous or harsh results.

Norton, 284 U.S. at 414.

However, in giving consideration to the proper interpretation of the term "member of a crew," care must be taken not to simply accept the interpretation given to the term "member of a crew" in cases brought under the Jones Act. In cases brought under the Jones Act, a broad application of the jurisdictional aspects of that Act is appropriate and consonant with the Congressional intent behind that statute, since it too has a "policy of liberal construction." *Warner v. Goltra*, 293 U.S. 155, 156 (1934). In *Warner*, the Supreme Court recognized that, in interpreting the jurisdictional provisions of the Jones Act,

> verbal niceties were bent to the over-mastering purpose of the act to give protection to workers injured upon ships. 'Words,' we said 'are flexible.' International Stevedoring Co. v. Haverty, [272 U.S. 50, 52 (1926)]. Later decisions of this Court have been conceived in a like spirit [citations omitted], and other courts have followed suit. [Footnote omitted.]

Warner, 293 U.S. at 156-57.

The clash between a liberal interpretation of the Jones

Act and a liberal interpretation of the Longshore Act has been of particular importance, because the exclusivity provisions of the Longshore Act prohibit recovery under the Jones Act if it is shown that a claimant is not a "master or member of a crew of any vessel." *See, e. g., Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, *reh. denied*, 353 U.S. 931 (1957). Because of this fact, courts presented with a claim under the Jones Act have stated on many occasions that the terms "seaman" and "master or member of a crew of any vessel" have come to be used interchangeably. *See, e. g., Noble Drilling Corp. v. Smith*, 412 F.2d 952, 955 (5th Cir. 1969), *cert. denied*, 396 U.S. 906 (1969). In terms of the results reached in cases brought under the Jones Act, this statement has some validity: a "seaman" under the Jones Act can recover under that act only if the employer cannot establish that the claimant is not a "master or member of a crew of any vessel," thereby escaping the exclusivity provisions of the Longshore Act. *See Senko.* Therefore, in order to satisfy the "policy of liberal interpretation" of the Jones Act, *Warner v. Goltra*, some courts have applied the test for "seaman" status to the question of whether a claimant is a "master or member of a crew of any vessel" *when presented with this question in a Jones Act claim. See, e. g., Noble Drilling Corp. v. Smith.* 10/

10/ *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980), is inapplicable to the instant case since *Longmire* does not present a situation where there is a conflict between the policies of liberal interpretation underlying both the Jones Act and the Longshore Act. In *Longmire*, the Fifth Circuit was presented for consideration with a case involving an injured employee's claim under both the Jones Act and the Outer Continental Shelf Lands Act (OCSLA), the latter which by its terms incorporates the exclusivity provisions of the Longshore Act, *see* 43 U.S.C. §1333(c), and contains a definition of "employee" which excludes a "member of a crew of any vessel." 43 U.S.C. §§1333(c) (1). Because the claimant in Longmire was assured of coverage under either the Jones Act or OCSLA, the policies of liberal interpretation of these acts were irrelevant.

In cases arising under the Longshore Act, however, recognition of the distinction between a "seaman" and a "master or member of a crew" is important in order to effectuate the beneficent purposes of these acts. In *South Chicago Coal & Dock Co. v. Bassett* 309 U.S. 251 (1940), a case arising under the Longshore Act, the Supreme Court reviewed the history of the distinction between "seaman" and "master or member of a crew" and noted its "important significance." *Bassett*, 309 U.S. at 256-57. The Board has also recognized the necessity for a liberal construction of the Longshore Act in cases brought before it on appeal. In such cases, the Board has adopted a three-part test which must be satisfied in order for a worker to fall within the member of a crew exception:

(1) There must be a vessel in navigation;

(2) The worker must have a more or less permanent connection with the vessel; and

(3) The worker must be aboard the vessel primarily to aid in navigation. *Crauthers v. Northwestern Construction Co.*, 9 BRBS at 882. *See also Craig v. American Dredging Co.*, 10 BRBS 1014, 1015-16 (1979), *petition for review denied*, No.79-4183 (2d Cir. Feb. 26, 1980); *McIntosh v. Parkhill-Goodloe Co.*, 4 BRBS 3, BRB No. 75-263 (1976), *aff'd mem.*, 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

The administrative law judge gave a full and reasoned consideration of the facts in this case in making his determination that the decedent was not a "member of a crew of any vessel."

> The evidence in the instant case reveals that [the decedent] was under the general supervision of the Chief Spotter Pilot, who was

> land-based and who himself had no more than a cooperative responsibility to the captain(s) of the vessel(s). [The decedent] received no instructions from the captain(s) of the vessel(s), was never quartered on the vessel(s), could not set his aircraft on the vessel(s), nor was he subject to any element of the supervision and control normally existing in an employer/employee relationship or of that common to the relationship of captain and crew member. The only identifiable similarity between [the decedent] and crew member, who from time to time climbed into the crow's nest, was the function of spotting the fish and directing the purse boats. But, the singular similarity is clearly distinguishable by reason of the fact that the former began his function from land, performed the function over navigable waters and returned to his land base, while the latter began his function aboard ship, climbed into the crow's nest, performed his function on navigable waters and returned to his berth as a crewman. The situs of performance was the same, the nature of the function was the same, only the point of beginning and ending were different.

Decision and Order at 8.

It is clear from the above findings and the record that the decedent was certainly not aboard a fishing vessel in any sense of the word, and it is beyond serious dispute that the decedent was not connected with a particular boat in any sense other than to assist all of the vessels in catching the fish. Furthermore, the record shows that the decedent was responsible only to the Chief Spotter Pilot and not to

anyone aboard the fishing vessels. While Judge Kalaris admits that "a fish spotter pilot is neither physically aboard nor permanently assigned to only one particular vessel," yet she nevertheless concludes that the decedent qualified as a crew member. Such a conclusion is a major departure from established law.

Since the humanitarian purpose of the Act favors awards in arguable cases, *Leyden v. Capital Reclamation Corp.*, 2 BRBS 24, BRB No. 74-266 (1975), *aff'd mem.*, 547 F.2d 706 (D. C. Cir. 1977), the "member of a crew" exclusion must be construed to ensure that all claimants arguably not "crew members" are not denied coverage on that basis. Therefore, Judge Kalaris' interpretation runs contrary to both law and the remedial purposes of the Act.

IV.

Judge Kalaris' reliance on the case of *Northeast Marine Terminal Co. v. Caputo*, 6 BRBS 150, 430 U.S. 249 (1977) (hereinafter, *Caputo/Blundo*), to deny coverage to the decedent is also erroneous. In *Caputo/Blundo*, the United States Supreme Court stated as follows.

> In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act, (LHWCA) 33 U.S.C. §901 *et seq.* in substantial part to 'extend [the Act's] coverage to protect additional workers.' S. Rep. No. 92-1125, 92 Cong., 2d Sess. (1972).

432 U.S. at 251-52. The Court further noted as follows:

> This case also does not involve the question whether Congress excluded people who

> would have been covered before the 1972 amendments; that is, workers who are injured on navigable waters as previously defined.

432 U.S. at 265 n.25. In *Caputo/Blundo*, the Supreme Court was dealing with the question of whether the Act extended coverage to include certain workers injured *shoreward* of the pre-1972 line. Therefore, there is no basis for applying *Caputo/Blundo* to deny coverage to an employee who is killed on navigable waters as defined prior to the 1972 amendments to the Act. *See* Part II *supra*.

Furthermore, the Supreme Court in *Caputo/Blundo* recognized that Congress intended to expand coverage to include modernization of longshoring techniques and, therefore, found Blundo, a checker injured on the dock, covered under the 1972 amendments to the Act. This modernization element set forth in *Caputo/Blundo* would appear to support claimant, since Judge Kalaris is arguing that the decedent's piloting chores were performed by crewmen *before the advent of fish spotter piloting*. As the Supreme Court emphasized,

> [t]he language of the Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results.' [Citation omitted.]

432 U.S. at 268. Thus, *Caputo/Blundo* supports affirmance, rather than denial, of the administrative law judge's Decision and Order.

V.

This case highlights the incongruous results which can be achieved when the Act is interpreted without reference to its beneficent purpose. The incongruity in this case lies in the fact that Judge Kalaris would hold that the decedent was a member of a crew of a vessel, while Judge Smith would hold that the decedent was not engaged in maritime employment. While these positions are 180 degrees apart, they have combined to deny coverage to one who clearly would have been covered prior to the 1972 amendments to the Act.

Interpreting the Act in light of its beneficent purpose, I would hold that the decedent was covered under the Act. Therefore, I would affirm the decision of the administrative law judge and dissent from the decision of my colleagues.

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

Dated this 17th day of August 1981

SERVICE SHEET

BRB No. 80-287Sunny G. Ward (Widow of John D. Ward, Sr.) v. Zapata-Haynie Corporation and Hartford Insurance Company (Case No. 79-LHCA-1676N) (OWCP No. 6-43746)

Copies were sent to the following:

Alben N. Hopkins, Esq. — Certified
Hopkins and Logan
2701 24th Avenue
Gulfport, MS 39501

John L. Hunter, Esq. — Certified
Cumbest, Cumbest and
Hunter, P.A.
P.O. Drawer 1287
707 Watts Avenue
Pascagoula, MS 39567

Mr. Cornelius S. Donoghue, Jr. — Certified
Acting Associate Solicitor
U.S. Department of Labor
Suite N-2620, NDDL
Washington, D. C. 20210

Mr. Aaron M. Moore
Assistant Deputy Commissioner
US DOL/ESA/OWCP
311 West Monroe Street
Jacksonville, FL 32201

Judge Ben Walley
U.S. Department of Labor

Suite 901
1001 Howard Avenue
New Orleans, LA 70113

Mr. Ralph M. Hartman
Director, Office of Workers'
Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, DC 20210

APPENDIX C

U.S. Department of Labor

Office of Administrative Law Judges
Hebert Federal Building
Room 909, 600 South Street
New Orleans, Louisiana 70130

Reply to the Attention of : OALJ

In the Matter of

JOHN D. WARD, SR., Deceased

Claimant

against

ZAPATA-HAYNIE CORPORATION

Employer

HARTFORD INSURANCE COMPANY

Carrier

Case No. 79-LHCA-1676N
OWCP 6-43746

John L. Hunter, Esq.
Post Office Drawer 1287
Pascagoula, Mississippi 39553
For the Claimant

Alben N. Hopkins, Esq.
Post Office Box 566
Gulfport, Mississippi 39501
For the Employer/Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for the compensation benefits (death benefits) provided under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.§901, *et seq.* (hereafter the "Act"), filed by Sunny G. Ward, widow (of John D. Ward, Sr., hereafter the "Employee") and their minor sons, John David Ward, Jr. and Travis Charles Ward (hereafter the "Claimant-Dependents"), against Zapata-Haynie Corporation, a subsidiary of Zapata Protein, Incorporated (hereafter the "Employer"). The claim arises as a result of the death of Employee on September 11, 1978.

A hearing was scheduled and held on September 6, 1979; the record was kept open to allow taking of depositions and filing of briefs; time was extended, by request; and, the record was closed on November 19, 1979.

Findings of Fact and Conclusions of Law

Although the parties did not enter into agreement on any of the basic facts necessary to a resolution of the problems involved, I find from the evidence of record, uncontradicted, that Employee was engaged in employment as a fish spotter with Employer on September 11, 1978, the date he lost his life as a result of a crash of his Cessna 172 aircraft into waters of the Mississippi Sound, some two miles off the gulf coast of Mississippi. In addition, I find from the records that Employee left surviving him dependents defined by Section 2(14) and (16) of the Act as follows: Sunny G. Ward, widow; John David Ward, Jr., born November 23, 1970; and Travis Charles Ward, born September 15, 1977.

The material issues on which agreement could not be reached and which were addressed by proof are: (1) was Employee, now deceased, covered by the provisions of the Act; (2) did Employee lose his life in the course of his employment; and (3) what was the average weekly wage of Employee?

Since all compensation benefits to be paid, if any, are based on Employee's average weekly wage, I will answer the stated questions in inverse order.

Average Weekly Wage

Employee entered into a contract of employment with Employer on September 21, 1977, which provided for the payment of $4,310.00 during the effective period of the agreement, payable at the rate of $530.00 weekly, the first payment to be made on April 17, 1978, plus a bonus of four cents per thousand fish caught weekly and one cent per thousand fish caught at the end of the season, to be paid on or before October 13, 1978. The contract covered the period from April 17, 1978 to October 13, 1978 and provided that the spotter (Employee) shall be entitled to the standard company benefits of Employer in effect at the time of this contract. (Employee Exhibit 1, attached to deposition of E. D. Conn, Jr. taken on August 31, 1979.)

Based on the contract of employment and a computation of the earnings from the "bonus" provisions, witness George Brumfield, Operations Manager of the facility where Employee performed his contract, testified by deposition dated October 15, 1979 that Employee earned a total of $21,950.45 for the year immediately preceding his death on September 11, 1978.

The nature of Employee's employment is significant in arriving at his average weekly wage. He was employed as a fish spotter pilot, flying a Cessna 172 aircraft from an airport nearby to a fishing boat or boats in the Gulf of Mexico engaged in fishing for menhaden to be processed at a plant nearby. The job was performed seasonally from about mid April to mid October, and then only in good weather. During inclement weather, the "spotting" was done by a member of the crew from the crow's nest. Although the "spotter pilots" work seasonally and for about six months and during the remainder of the year the employer/employee relationship does not exist, the witness Brunner stated:

> However, the spotter pilots are entitled to - the company really looks at them being on a leave of absence, which allows them to continue company benefits, and so forth, so that they can accrue pension benefits, profit-sharing, etc.
>
> JUDGE WALLEY: Perhaps medical health insurance.
>
> THE WITNESS: Yes. Group insurance they can prepay. Yes, sir.

(Tr. p. 44).

This witness was asked if the "spotter pilots" drew unemployment compensation for the remainder of the calendar year and he replied:

> THE WITNESS: I don't know that for a fact. A lot of our fishmen, for example, draw unemployment during the off-season. Whether the spotter pilots drew it, I can't say.

JUDGE WALLEY: It's seasonal. And your employment with these spotter pilots then is a seasonal job, as far as you're concerned?

THE WITNESS: Yes, sir.

JUDGE WALLEY: All you pay this man in a twelve month period is for the work he does from the approximate middle of April until the middle of October?

THE WITNESS: That's correct, sir.

(Tr. p. 43).

Based upon the foregoing summary of the evidence of record, I find and determine that Employee was a "seasonal worker" under a special contract of employment providing a "weekly wage" plus a weekly and seasonal bonus based on production (all to be paid within approximately six months), and providing "fringe benefits" for the entire year. Further, Employer "really looks at them being on a leave of absence". While "a lot of our fishermen draw unemployment during the off-season," it was not known "whether the spotter pilots drew it". The actual drawing of unemployment compensation is immaterial as to "earning capacity" since it does not constitute "earnings" and is not a part of the wages to be determined under Section 10 of the Act. *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, BRB No. 75-177 (February 25, 1976).

In addition and since the Act does not contain an express provision for "seasonal" employment, I conclude that I cannot determine the "average weekly wage" for Employee under Section 10(a) or (b), but must make that determination under Section 10(c) of the Act.

Employee was only one "fish spotter pilot" among some twenty-seven or more such "spotter pilots" working for Employer. All of these "pilots" were under separate contracts but of the same or similar terms. Therefore, all "of (the) other employees of the same or most similar class working in the same or neighboring locality, would have earned the same or similar annual earnings" and I find and determine that the sum of $21,950.45, actually earned by Employee, reasonably represents the annual earning capacity of the Employee. Too, since I have determined that the foregoing sum represents the "average annual earnings", it should be divided by fifty-two to obtain the "average weekly wage", in this case it would be $422.12, according to Section 10(d) of the Act.

Course of Employment

The uncontradicted facts of record establish that Employee was a "fish spotter pilot" in the employ of Employer; that he had departed from an airfield and had flown to the area of the Gulf of Mexico or in the Mississippi Sound where a fishing vessel (or vessels) was located and flew over the area for the express purpose of locating a school or schools of menhaden fish; that once the "school" was located and by way of two-way radio on channel with the vessel, he directed the activity of crew members in pulling, spreading and closing nets to catch the fish and then they were loaded aboard the vessel. This function was performed repeatedly until Employee was required to or did return to an airport.

On the occasion of the fatal accident, Employee had finished his particular service and had departed the area of his co-workers to return to his landing field. Radio contact was terminated on departure at about 12:20 p. m. when Employee had finished briefing his "relief pilot" while

working his vessel, the ALBERT J. BOURG. This was the last radio contact with Employee and was within about ten miles of his usual landing strip. Some ten minutes later the captain of another vessel, M/V LAIS K, reported an aircraft in the water. Employee had crashed and lost his life. The crash occurred about two miles south of Gautier, Mississippi, but the cause of death was not established during the accident investigation.

The accident report nor the investigation by the National Transportation Safety Board reveal any mechanical failures or pilot errors. There was no evidence to prove or even suggest that coverage of Employee should be denied under Section 3(b) of the Act.There was a request made of the surviving widow that an autopsy be permitted. Permission was not granted and no presumptions can be drawn from such refusal.

Employer has raised the specter that death did not occur in the course of the employment. I find and conclude that this is not well taken and there is not one scintilla of evidence to establish that position. Section 20(c) and (d) specifically require Employer to come forward with substantial evidence to rebut the presumptions therein enumerated. None has been offered and this question is answered affirmatively and Employee did lose his life in the course of his employment.

Coverage

The answer to the question of coverage is found in the Act and as interpreted by case law applied to the facts of each case. Pertinent provisions of the Act are:

Section 3(a) of the Act (all references to Act

sections are to 33 U.S.C. section 901, *et seq.*, unless otherwise specified), provides among other things, the following:

> SEC. 3(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .

The parenthetical inclusion was inserted by the 1972 amendments (P.L. 92-576-Eff. 11-26-72).

Prior to the 1972 amendment, the courts had construed this Section to create a single situs requirement for coverage and that requirement limited coverage to workers whose "disability or death result(ed) from an injury occurring upon the navigable waters of the United States (including any dry dock). . ." Longshoremen's and Harbor Workers' Compensation Act of 1927, Section 3(a), 44 Stat. 1426. This was known as the *Jensen* line and was understood to draw a sharp line between injuries sustained over water and those suffered on land. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Thus, in maritime law, the locality of the tort traditionally governed the scope of maritime jurisdiction, *Earles v. Union Barge Line Corporation, et al.*, 468 F.2d 1097 (1973), when the wrong bore a significant relationship

to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed. 2d 454 (1972).

The "harshness" of the rule in *Jensen* was further addressed by amendment of Section 2(3) of the Act as follows:

> Section 2(3) provides:
>
> When used in this Act - -
>
> > (3) The term 'employee' (means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . .)

The language following the term "employee", in parenthesis, was the 1972 amendment, and both Sections, 3(a) and 2(3), contain the following exclusion:

> . . .but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair and small vessel under eighteen tons net.

In light of the foregoing amendments (1972), the Courts have determined that the eligibility for compensation benefits (coverage) is to be determined by the "newly broadened situs" test and a "newly created status" test. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S. Ct. 2348 (1977); and *P. C. Pfeiffer Co. v. Ford,* No. 78-425 (November 27, 1979). To be eligible for compensation, a person must be an employee as defined by Section 2(3)

who sustains injury on the situs defined by Section 3(a), 33 U.S.C. §§902(3) and 3(a).

In *Pfeiffer Co. v. Ford, supra,* the Court, construing those Sections as amended, said:

> "The Act, as noted above, contains distinct situs and status requirements. The situs test of §3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line. This test defines the broad geographic coverage of the Act. Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment." This section defines the Act's occupational requirements. The term "maritime employment" refers to the nature of a worker's activities. Thus, §2(3) uses the phrase "longshorem[e]n or other person[s] engaged in longshoring operations" as one example of workers who engage in maritime employment no matter where they do their job. Since §3(a) already limits the geographic coverage of the Act, §2(3) need not provide that longshoremen are covered only if they work in certain places. The use of the term "maritime employment" in §2(3), therefore provides no support for the proposition that the statutory definition of an employee imports a geographic limitation narrower than the one defined in §3(a)."

The Court went on to say:

> "We believe that §2(3)'s explicit use of the

terms "longshoremen" and "other person[s] engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act. We do not suggest that the scope of maritime employment depends upon the vagaries of union jurisdiction. *Id.*, at 268, n. 30. Instead, the crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. *Id.*, at 267. n. 28. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the process. We therefore hold that Ford and Bryant were engaged in maritime employment because they were engaged in intermediate steps of moving cargo between ship and land transportation."

Evidence in the instant case establishes that Employee was employed, by a contract, as a fish spotter pilot, whose duties were to pilot a land-based aircraft (Cessna 172) to an area within the navigable waters of the United States in the Mississippi Sound and/or the Gulf of Mexico for the purpose of locating schools of menhaden fish. Employer would have and did have one or more fishing vessels in the area of operations and once Employee had "spotted a schools or schools of fish, he would, by use of two-way radio on a pre-set frequency, advise the captain(s) of the vessel(s) and they would launch purse boats preparatory to "netting" the fish. Then, Employee would direct the purse boat operators to the "school", direct them to separate and proceed for a

distance, then direct them to encircle the "school" by closing their nets.

Historically, prior to the spotter pilot, the use of aircraft, the fish were located from the fishing vessel by a member of the crew, who climbed into the crow's nest and, from his vantage point, directed the "netting" operation. Obviously, that "spotter" was under the supervision and control of the captain of the vessel. Not so in the instant case.

The evidence in the instant case reveals that Employee was under the general supervision of the Chief Spotter Pilot, who was land-based and who himself had no more than a cooperative responsibility to the captain(s) of the vessel(s). Employee received no instructions from the captain(s) of the vessel(s), was never quartered on the vessel(s), could not set his aircraft on the vessel(s), nor was he subject to any element of the supervision and control normally existing in an employer/employee relationship or of that common to the relationship of captain and crew member. The only identifiable similarity between Employee and crew member, who from time to time climbed into the crow's nest, was the function of spotting the fish and directing the purse boats. But, the singular similarity is clearly distinguishable by reason of the fact that the former began his function from land, performed the function over navigable waters and returned to his land base, while the latter began his function aboard ship, climbed into the crow's nest, performed his function on navigable waters and returned to his berth as a crewman. The situs of performance was the same, the nature of the function was the same, only the point of beginning and ending were different.

There is evidence of record, and not in dispute, that the fatal crash site was in the Mississippi Sound some two miles south of Gautier, Mississippi and in the territorial waters of

the State of Mississippi. This fact is immaterial. The evidence clearly reflects that the nature of the work required Employee to perform his employment over navigable waters and on the date of his death he had just terminated radio contact with the captain of the vessel M.V. ALBERT J. BOURG, which was operating several miles further south into the Gulf of Mexico, and unquestionably he was on his return to his landing base. Thus, his death occurred at a situs that meets the most exacting requirements of the law.

Therefore, after careful consideration of the nature of the service being performed by Employee as heretofore described and that Employee met his death at a location that clearly meets the situs requirements of the law, I find and conclude that Employee was actually and actively engaged in maritime employment at the time of his fatal accident at a situs that meets the requirements of the law and he was covered by the provisions of the Act.

On October 4, 1979 counsel for Claimants filed an itemized petition for attorney's fee as provided by the regulations, identifying the services rendered, the date of the service and the time required to perform it. The petition accounts for a total of 61.5 hours of time spent, accounts for services billed by item (and not an hourly charge) for $68.00, claims $345.86 as "total expenses of investigation, etc.", and an anticipated cost of $225.00. Counsel requests approval of $75.00 per hour as a rate for services rendered. Counsel for Respondents express no objections to the time spent in rendering the service nor for any item claimed, only an objection to the hourly rate of $75.00 and opines that $40.00 per hour is sufficient and normal for such services in the area of its performance.

The consideration of attorney's fees under Section 28 of the Act has prompted much discussion. The regulations

provide that: "No contract for a stipulated fee or for a fee on a contingent basis shall be recognized." Yet, the Court of Appeals for the Fourth Circuit has stated:

> The contingency of compensation. . . . is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cased in which his client prevails must take account of the lawyer's risk of receiving nothing for his services.

Mc Kittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967).

The petition before me contains the following item:

10-4-79	Reviewing file, itemization of time and expenses, and Petition for Attorneys Fees	4 hrs. 300.00

This item shows on its face that it was not time spent in representing Claimant, but for time spent in preparing a bill for services rendered, for which Employer is not liable under Section 28 of the Act. Payment for this item is not approved. Also, the item "Total Expenses of Investigation, Etc. to Date" (dated October 4, 1979) billing for $345.86 is not otherwise itemized or explained. It does not meet the requirements of 20 C.F.R. §702.132 of the regulations and is therefore denied. The final entry of "Anticipated cost of transcribing 3 depositions, $225.00" was made on October 4, 1979 and a reply on November 19, 1979 to "objections" made by counsel for Respondents on November 14, 1979 made no explanations or clarifications of any "anticipated cost" and the "final" item of $225.00 is denied.

Therefore, based upon a consideration of the petition filed, the objections made thereto, and the specific observations set out above and measured by the law cited, that a fair and reasonable fee for 57.5 hours spent, at $75.00 per hour, in the amount of $4,312.50, and the sum of $68.00 for special items charged at a described rate, should be approved, making a total of $4,380.50.

ORDER

It is therefore ORDERED:

1. That Employer shall pay to Sunny G. Ward, widow, and dependents of the Employee, who lost his life in the course of his employment with the Employer on September 11, 1978, death benefits as provided by Section 9(b) of the Act, said benefits to be computed and paid, based on an average weekly wage of $422.12, from and after September 11, 1978 and to be paid in a lump sum together with interest at the rate of six per cent per annum on all sums from the date they became due until paid in full; and

2. Employer shall pay unto Sunny G. Ward, widow, and dependents the further benefits provided under Section 9(a) of the Act; and

3. Employer shall pay unto John David Ward, Jr., born November 23, 1970, and Travis Charles Ward, born September 15, 1977, both dependents of John Ward, Sr., Deceased, or to their guardian, the additional sum of sixteen and two-thirds per centum of $422.12, the average weekly wage of Deceased, said benefits to be computed and paid from and after September 11, 1978, in a lump sum, and to bear interest at the rate of six per cent per annum on all sums from the date they became due until paid in full; and

4. Employer shall have and take proper credit for all death benefits heretofore paid to the above named dependents under the compensation laws of the State of Mississippi; and

5. Employer shall pay directly to John L. Hunter, Esquire, counsel for Claimant, for legal services rendered herein the sum of $4,380.50.

/s/ Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Dated: March 11, 1980
New Orleans, Louisiana

CERTIFICATE OF FILING AND SERVICE

I certify that on March 14, 1980 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Sixth District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Claimant - Ms. Sunny G. Ward, 1405 Lagrange Drive, Gautier, MS 39553

Insurance Carrier or Employer (if self-insured) - Hartford Insurance Group, P.O. Box 8350, Metairie, LA 70011

Attorney John Hunter, P. O. Drawer 1287, Pascagoula, MS 39567

Attorney Alben N. Hopkins, P. O. Box 566, Gulfport, MS 39501

A copy was also mailed by regular mail to the following:

Judge Ben H. Walley, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D. C. 20210

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D. C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U. S. Department of Labor, Washington, D. C. 20211

/s/ Aaron M. Moore
Deputy Commissioner

Sixth Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION
Office of Workers' Compensation
Programs

Form LS-19
Rev. Aug. 1975